

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
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In the Matter of)

CC Docket No. 95-185

Interconnection Between Local Exchange Carriers)
and Commercial Mobile Radio Service Providers)

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REPLY COMMENTS OF OMNIPOINT CORPORATION

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SUMMARY

Omnipoint strongly supports the Commission's tentative proposal to adopt a national interim bill-and-keep scheme for termination of traffic between LEC and CMRS networks.

CMRS commenters demonstrated a pervasive and disturbing nationwide trend -- incumbent LECs simply have not and will not compensate CMRS operators for the termination of LEC traffic. This refusal to treat CMRS operators as co-carriers thwarts years of Commission policy. In addition, it greatly threatens the introduction of CMRS competition at the local level, especially wireless local loop. LECs' claims that the current scheme of private negotiation is working well are soundly refuted by the evidence presented in this proceeding.

In addition, the Commission is amply within its jurisdiction to impose an interim bill-and-keep scheme while it promulgates a more sensible and pro-competitive long-term reciprocal compensation mechanism. Section 332 provides that the Commission shall order interconnection from all common carriers, including incumbent LECs, upon reasonable request by a CMRS operator. The 1996 Act does not in any way repeal or diminish the Commission's statutory obligations under Section 332. Rather, in 1993, Congress directed that CMRS be regulated under a comprehensive federal regulatory plan. Because bill-and-keep benefits both common carriers, it does not constitute a regulatory taking. Rather, it is simply an interim measure to better establish federal regulatory control over the interconnection between CMRS and LEC networks while a long-term solution, based on the emerging competitive environment, can be better ascertained.

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REPLY COMMENTS OF OMNIPONT CORPORATION

Omnipoint Corporation ("Omnipoint") hereby replies to the myriad comments filed in the above-captioned proceeding. Two issues predominate those comments.

First, CMRS commenters document that the LECs have consistently used interconnection rates and related practices to put competitors at a disadvantage, directly frustrating years of FCC attempts to ensure reasonable, reciprocal compensation. It is *essential* for CMRS operators offering competitive services such as wireless local loop to have (a) reciprocal compensation with the incumbent LEC and (b) an end to the *status quo* negotiations, which will inevitably lead to litigation. Under the current circumstances, bill-and-keep is a perfectly reasonable interim scheme until data can be gathered that reflects the new competitive environment between CMRS and LEC providers. The incumbent LECs claim that all is well, and will continue to get better after implementation of the Telecommunications Act of 1996 (the "1996 Act"). In essence, the LECs would prefer that CMRS operators wait until the Commission's interconnection rulemaking proceedings are concluded, then negotiate for interconnection, and then, if interconnection negotiations break down, litigate. The advantages that would flow to the LEC as a result of this time-consuming process are obvious.

Second, and perhaps driven by the first issue, the same groups strongly disagree whether the Commission has jurisdiction to impose an interim bill-and-keep rule. The LECs argue that

the 1996 Act has imposed a new interconnection paradigm of private negotiation and state review, leaving the Commission's hands tied with respect to CMRS interconnection. The CMRS operators note that the Commission has continuing jurisdiction over interconnection, particularly in light of Section 332 of the Communications Act.

As Omnipoint suggested in its comments, the Commission can and should resolve the problems of LEC-CMRS interconnection by requiring bill-and-keep on at least an interim basis, and then evaluate the need for long-term interconnection rules as CMRS competitors deploy competitive systems over the next few years.¹

I. The Commission Needs to Resolve the Current Interconnection Problem by Requiring Bill-and-Keep on at Least an Interim Basis And Then Consider Long-Term Mutual Compensation Solutions.

A variety of CMRS commenters, including cellular, PCS, and SMR providers, offered concrete examples that LECs simply do not offer CMRS operators reciprocal or mutual compensation. Against this hard evidence, the LECs' theoretical arguments fail to explain why their current interconnection practices so openly disregard the FCC's pre-existing mutual compensation obligations. The CMRS comments demonstrate that there is an immediate LEC-CMRS problem that the years-long rulemaking, negotiation, and litigation process created by the 1996 Act will not address soon enough for CMRS providers, especially those that have paid billions of dollars to the federal government for PCS licenses to participate in local competition. Alleged imbalances of LEC-CMRS traffic provide no excuse for holding back an interim bill-and-keep scheme -- traffic flows for wireless local loop, almost by definition, will be symmetric,

¹ While these reply comments focus on two issues, Omnipoint continues to urge the Commission to (a) adopt a bill-and-keep scheme that includes all costs of call termination, including tandem switching and transport, and (b) clarify that CMRS operators are entitled to recover IXC access charges and a ratable portion of LEC access charges for calls actually terminated by the CMRS operator.

and any historical asymmetry is in part a product of wholly one-sided compensation arrangements. Interim bill-and-keep is necessary now so that local competition can begin and a sensible, long-term solution can be found.

A. Current Interconnection Agreements Show the LECs' Unwillingness To Provide Reciprocal Compensation.

A broad cross-section of providers of CMRS services filed comments demonstrating that wireline LECs throughout the country fail to offer reciprocal compensation.

Perhaps most condemning are the comments and rate chart provided by Bell Atlantic NYNEX Mobile ("BANM") depicting the average rate per minute charged by Bell Atlantic and NYNEX across several states, including Omnipoint's licensed area in the New York MTA. Comments of BANM at 4-5 & Exhibit A. Only in New York does NYNEX even offer reciprocal compensation. In all other jurisdictions, NYNEX either pays nothing for terminating its traffic on the CMRS network or, as in Connecticut, requires the CMRS operator to pay *both* ways, *i.e.*, for terminating the RBOC's traffic.² Bell Atlantic offers no reciprocal compensation anywhere in its five-state region. If this is how the LECs treat their own subsidiaries, it is not surprising that unaffiliated CMRS competitors have faced nearly monolithic rejection of mutual compensation by the LECs.

It is Omnipoint's experience that even the apparent reciprocal compensation imposed on NYNEX by the State of New York lacks true mutuality. For example, NYNEX offers no compensation for calls it passes to Omnipoint's network that were not originated on NYNEX's network. NYNEX also will not share in the access charges it collects from IXC's for call

² NYNEX also requires the CMRS operator to pay both ways in Massachusetts. Should the Commission decide that the LECs have violated reciprocal compensation obligation, the Commission should consider retroactive adjustments as a means of compensating CMRS operators for these prior abuses. 47 U.S.C. §§ 206, 207.

termination when, in fact, it uses Omnipoint's network to terminate the call. Finally, both NYNEX and Bell Atlantic apply charges based on wireline definitions of "local" and "toll" calls (*i.e.*, LATA and state boundaries) originating on Omnipoint's network, while such boundaries may have no significance to MTA or even BTA PCS providers,³ and only drive up the costs of interconnection for the mobile provider.

APC, presently the only commercial broadband PCS provider in the continental U.S., has encountered similar "stark asymmetry" for interconnection rates from Bell Atlantic. APC reports that, while the two local networks provide essentially equivalent functions and traffic flows are roughly equal, Bell Atlantic requires it to pay for interconnection while Bell Atlantic offers no such reciprocal compensation. Comments of APC at 4 - 11. Bell Atlantic's pricing practices, including an apparent CCL charge for local calls through a \$25 per trunk surcharge⁴ and landline toll and local definitions that are irrelevant for an MTA provider, are characteristic of the lengths that incumbent LECs will go to in order to frustrate the principles of mutual compensation.

³ For example, there is no reason why Omnipoint should face variable interconnection costs (and thus be forced arbitrarily to price service differently) for a call from an Omnipoint mobile subscriber in New York City to a NYNEX wireline subscriber in Newark depending on which side of the Tappan Bridge the mobile subscriber calls from. Even worse, if that Omnipoint subscriber later goes to Connecticut (which is still within the New York MTA and just a short distance away) NYNEX charges Omnipoint yet again for the subscriber to *receive* a call from Newark.

⁴ In charging a carrier or end user common line charge, Bell Atlantic's apparent position that broadband PCS operators are not competitive local exchange carriers entitled to co-carrier status defies explanation. This approach is also inconsistent with the Commission's tentative conclusions in the on-going proceeding to permit flexible CMRS service offerings (Notice of Proposed Rulemaking, WT Docket No. 96-6, FCC 96-17 (released January 26, 1996)) in order to provide fixed wireless services in competition with the wireline local loop. *See also* Notice of Proposed Rulemaking, WT Dkt. No. 96-59, FCC 96-119 at ¶ 26 (released March 20, 1996) (FCC tentatively concludes that rapid auction of broadband PCS D, E, and F licenses will promote competition "at the earliest possible point . . . with wireline service providers.").

Cellular providers also confirm that mutual compensation has been a long-standing Commission policy that is largely ignored by the local wireline monopolies. *See, e.g.* Comments of Rural Cellular Corp. at 5 ("RCC receives no compensation for terminating calls that originate on the wireline network."); Comments of Western Wireless at 13 (interconnection agreements with LECs "contain no language, or make any reference to, reciprocal compensation for traffic terminating on Western Wireless' network"); Comments of 360° Communications Company at 3 ("With the exception of one carrier, 360 does not receive any compensation from any LEC with which it has interconnection arrangements. 360 has tried on numerous occasions to negotiate mutual compensation but has been unsuccessful because of the unwillingness of the LECs to allow it"); Comments of Century Cellunet at 4 ("Century pays various LECs to terminate mobile originating traffic, while the same LECs do not pay Century to terminate landline originating calls. . . . in some states, Century *actually pays the LEC* for terminating these landline originating calls."). These practices thwart competition relative to a system of reciprocal compensation.

Nextel's SMR system encounters the same problem -- "not a single LEC has agreed to compensate Nextel for terminating wireline-originated calls on Nextel's wireless network." Comments of Nextel at 3-4. NYNEX even requires it to pay "for LEC-originated calls terminated on Nextel's system" in every state served by NYNEX. *Id.* at n. 9.

This evidence demonstrates a pervasive and significant problem in the private negotiation process that the LECs have, to date, manipulated at the expense of CMRS providers and the public.

B. LECs' Practices and Comments Demonstrate An Open Disregard of the Commission's Reciprocal Compensation Rule.

The Commission has established for almost ten years a federal interconnection policy that requires mutual, reciprocal compensation.⁵ In its Second Report and Order, GN Dkt. No. 93-252, 9 FCC Rcd. 1411, 1498 (1994) ("CMRS Second R&O") the Commission reaffirmed that this policy applies to all CMRS providers: "[i]n providing reasonable interconnection to CMRS providers, . . . the principle of mutual compensation shall apply, under which LECs shall compensate CMRS providers for the reasonable costs incurred by such providers in terminating traffic that originates on LEC facilities." 47 C.F.R. § 20.11(b)(1) (same). Since release of that order in March of 1994, and as demonstrated by the comments filed on behalf of CMRS providers in this proceeding, the LECs have utterly ignored the order and Section 20.11(b)(1) of the Commission's rules.

In response, the LECs generally deny the existence of the problem. Bell Atlantic, for example, claims that the Commission is just proposing "a solution in search of a problem," and that "CMRS providers have enjoyed remarkable success under current arrangements" Comments of Bell Atlantic at 9. Southwestern Bell believes that "CMRS providers generally have significant and sufficient bargaining power to obtain appropriate interconnection arrangements." SBC Comments at 13. Although it does not explain how a new entrant can possibly obtain such bargaining power against the incumbent local monopoly (even with CAP or CLEC service to select portions of the population), the premise is at odds with the Commission's mutual compensation policy, *i.e.*, if there were equal bargaining power, a mutual compensation policy would not be necessary. Ameritech, implying that CMRS operators are in fact "satisfied"

⁵ *The Need to Promote Competition and Efficient Use of the Spectrum for Radio Common Carrier Services*, Declaratory Ruling, 2 FCC Rcd. 2910, 2915 (1987) ("In establishing the reasonable interconnection standard, we also expected telephone companies and cellular carriers to observe the principle of mutual compensation.").

with the current interconnection process, baldly requests for the Commission not to adopt bill-and-keep so that the current arrangements can "continue to reflect the principle of mutual compensation." Comments of Ameritech at 3. As demonstrated above, the current arrangements are anything but reflective of "mutual compensation."

USTA posits that the one-way interconnection charges against CMRS operators may, in fact, be consistent with mutual compensation; it believes that the charging reflects the net result of offsetting costs of interconnection, and the balance of costs just happen to always favor the LEC. Comments of USTA at 5. Of course, USTA fails to offer any evidence that the private negotiation methods have, in fact, produced rates that cover CMRS network costs. Given the obvious difference in bargaining power of the two parties, the price arrived at in negotiation has very little to do with either LEC or CMRS network costs.⁶ In addition, USTA's "net result" rationale for one-way charging fails to explain why, in jurisdictions such as Massachusetts and Connecticut (which is within Omnipoint's MTA license area), the LECs also charge CMRS providers to *terminate* LEC-originated traffic.

In sum, the LECs' practices, and their nearly unanimous cry that there is no problem with CMRS interconnection, show that the private negotiation process is very unlikely to yield efficient, reasonable interconnection. Promises that interconnection arrangements will improve under the private negotiation process of the 1996 Act are simply too little, too late. Based on Omnipoint's own experiences, these promises will simply not yield efficient, reciprocal compensation arrangements.

⁶ Estimates are that it LEC termination costs are .2 cents per minute, whereas the "net" charges levied by NYNEX, for example, range from 5 cents to 3.75 cents per minute. *See*, Comments of Comcast at 5; Comments of BANM at Exhibit A.

C. *Bill-and-Keep Is A Necessary Interim Solution to Correct Private Interconnection Negotiations That Are Frustrating National Interconnection Goals.*

Both the Congress and the Commission have established rapid introduction of competitive CMRS services as a key federal communications policy.⁷ Interconnection of CMRS networks with the PSTN is a critical component of the federal policy for achieving robust CMRS competition on a timely basis. CMRS Second R & O, 9 FCC Rcd. at 1499 ("commercial mobile service interconnection with the public switched network will be an essential component in the successful establishment and growth of CMRS offerings."); 47 U.S.C. § 332(c)(1)(B) (FCC shall order all carriers to interconnect with CMRS provider, upon reasonable request); H.R. Rep. No. 111, 103d Cong., 1st Sess. at 261 (1993) ("The Committee considers the right to interconnect an important one which the Commission shall seek to promote, since interconnection serves to enhance competition and advance a seamless national network.").

The current high cost "take-it-or-leave-it" interconnection plans offered by the LECs unmistakably threaten these federal policy goals in at least three ways. First, the difficult and unfair negotiation process slows the introduction of service to the public. Second, the current scheme leaves the CMRS operator with no compensation for the LECs' use of its network, thereby discouraging CMRS operators from making the enormous capital investments necessary to achieve Congress' vision of a "seamless national network." With their monopoly on the local exchange, the private negotiation leaves the CMRS operator hostage to accept the LECs' rates. This raises the cost of CMRS service, and undercuts federal goals for introduction of competitive services to consumers.

⁷ Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI, § 6002 (c) & (d) (Congress sets short deadlines for regulatory implementation of PCS); Memorandum Opinion and Order, GN Dkt. No. 90-314, 9 FCC Rcd. 4957, 4959 (1994).

Third, and in addition to high-cost monopoly rates for interconnection, the LEC application of its jurisdictional boundaries (*i.e.*, intrastate/intraLATA, interstate/intraLATA, intrastate/interLATA, and interstate/interLATA) causes CMRS operators to incur needless trunking and transport costs. For example, PCS providers with multi-LATA, multi-state license areas are required by both NYNEX and Bell Atlantic to establish a point of interconnection in every LATA and state.⁸ This forces the CMRS provider to order additional trunking because of LATA and state boundaries, and not based on the CMRS operator's traffic demand. The LEC will undoubtedly respond that these boundaries are imposed on it by various state or federal requirements in order to establish rates for calls that cross the various boundaries.⁹ However, by forcing the LECs' regulatory condition on CMRS competitors, this practice effectively undermines the Commission's federal policy in establishing MTA and BTA license boundaries that span across several states: "[T]he values of most broadband PCS licenses will be significantly interdependent because of the desirability of aggregation across . . . geographic regions." Fifth Report and Order, PP Dkt. No. 93-253, 9 FCC Rcd. 5532, ¶31 (1994); *see also* Memorandum Opinion and Order, GN Dkt. No. 90-314, 9 FCC Rcd. 4957, 4987-88 (1994) ("[t]he ten year history of the cellular industry provides evidence generally that . . . [MSA and RSA] service areas have been too small for the efficient provision of regional or nationwide mobile service);" Second Report and Order, GN Dkt No. 90-314, 8 FCC Rcd. 7700, 7732 (1993) (MTA areas were chosen to "facilitate regional and nationwide roaming; [and] allow licensees to

⁸ NYNEX has also indicated that Omnipoint would need to establish a point of interconnection at every tandem for inbound calls.

⁹ This regime of interconnection is essentially based on an era prior to the introduction of local exchange competition, with interconnection rules and practices modeled on LEC-to-IXC interconnection.

tailor their systems to the natural geographic dimensions of PCS markets."), *modified*, 9 FCC Rcd. 4957 (1994).

Bill-and-keep, at least on an interim basis, can eliminate all three problems. It is simple to administer and it encourages more rapid interconnection. Bill-and-keep also eliminates the demonstrated tendency of the local monopoly to charge excessive interconnection rates, and drive up the cost of CMRS service. In other words, bill-and-keep maintains the federal perspective for competitive mobile services at affordable rates. Moreover, bill-and-keep preserves the efficiencies of operating in large MTA or regional licensing areas by not permitting state or LEC definitions of "local" and "toll" to split up the MTA license area and undermine efficiencies with unnecessary transport costs. Finally, with an interim bill-and-keep method, the Commission and carriers could evaluate the true costs of transport and termination in a competitive environment, which will help the Commission to develop a viable, long-term interconnection solution.

Some LECs attempt to underplay the need for bill-and-keep by arguing that it amounts to a subsidy to CMRS operators and, citing cellular expansion and profits, assert that CMRS is doing well enough on its own. *See, e.g.*, Ameritech Comments at 6-7; Bell Atlantic Comments at 10-11. However, bill-and-keep is not a subsidy. It compensates each carrier through access to the others' network, and avoids settlement and administrative costs. Even if bill-and-keep does favor the introduction of CMRS, cellular duopoly profits (much of which was earned by subsidiaries of the very LECs that raise this argument) are not a valid barometer for the future profits or current economic condition of PCS and other new entrants.¹⁰ In fact, it was due to the

¹⁰ As the Commission noted in its First Report on competition in the CMRS industry, new entrants -- broadband and narrowband PCS, SMR, and various proposed mobile services -- are likely to invigorate the current mobile service market and drive consumer rates to competitive levels. *Annual Report and Analysis of Competitive Conditions with Respect to Commercial Mobile Services*, First Report, 10 FCC Rcd. 8844, 8871-72 (1995).

stagnant cellular duopoly enjoyed by the wireline monopoly that Congress initiated the regulatory changes to encourage a more competitive mobile services market. Finally, many PCS and other CMRS operators like Omnipoint and prospective Block C and F licensees are small businesses who have great need for minimizing costs and obtaining efficient interconnection. Given the Commission's sound policies favoring long-term small business participation in PCS and other CMRS services,¹¹ it is critical to advance those policies with rules and interim measures that avoid costs foisted on new entrants. *See* 47 U.S.C. § 257(a) (Commission shall eliminate rules that operate as "market entry barriers for entrepreneurs and other small businesses in the provision and ownership of telecommunications services . . . ").

Several LECs oppose bill-and-keep because they claim it is uneconomical in an environment where the LEC and CMRS traffic flow is unbalanced.¹² APC's traffic flow study -- demonstrating a roughly even traffic exchange -- suggests that the LECs' reliance on historical traffic flows with cellular interconnection may be a poor indicator of PCS - LEC traffic flow. In addition, this imbalance, like the inflated and one-sided interconnection rates, is partly a result of the LECs' own practices. For example, while "calling party pays" would assess the costs of call termination on the cost causer, the LECs have never implemented such a billing method. Instead, the LECs require that the *called* mobile party be charged; NYNEX even charges the *called* party at 1/2 the rate when the called party line is busy or not in service. This practice is indicative of the LECs' anti-competitive approach to CMRS interconnection.

Finally, Omnipoint notes that CMRS operators simply cannot afford to wait for the Section 251 and 252 interconnection process to work out before they receive sensible

¹¹ *See, e.g., Fifth Report and Order*, PP Dkt. No. 93-253, 9 FCC Rcd. 5532 (1994).

¹² Comments of Ameritech at 8-9; Comments of Pacific Bell at 13; Comments of SBC Communications, Inc. at iv.

interconnection. The process is likely to take years before CMRS providers will obtain mutual compensation or efficient interconnection, considering the time it will take for the Commission to promulgate final rules under Section 251(d), private negotiation with the LECs, state arbitration or state approval of an interconnection arrangement, and then possible appeal to the Commission or federal courts. CMRS operators, who have paid billions of dollars to the federal government for the rights to compete at the local level, need more than simply a promise of interconnection years from now. As discussed below, the 1996 Act provided CMRS operators with a better solution than just putting competition on hold while the future interconnection rules of Sections 251 and 252 are worked out. In preserving Section 332 interconnection rights, Congress authorized the Commission to order CMRS interconnection directly and expeditiously.

II. The Commission Has The Authority To Apply An Interim Bill-And-Keep Solution To The Current Interconnection Problem.

A. Sections 251 and 252 of the Act Do Not Supersede the Commission's Authority Under Section 332 To Regulate CMRS Interconnection.

LECs argue that Sections 251 and 252 of the 1996 Act have superseded the Commission's authority to require bill-and-keep. *See, e.g.*, NYNEX Comments at 6, 11; Bell Atlantic Comments at 2; Pacific Bell Comments at i (1996 Act "delegat[ed] to the states all authority related to the LECs' negotiation of contracts concerning interconnection rates.").¹³ Some go so far as to claim that Sections 251 and 252 are the exclusive statutory scheme for interconnection, with the states as the primary arbiter of all interconnection negotiation between telecommunications providers. *See, e.g.*, Comments of Pacific Bell at 3; Bell Atlantic Comments at 3; Comments of SBC Communications, Inc. at iii (1996 Act "eliminate[s] the

¹³ *See also, Ex Parte* Letter from Michael Kellogg, on behalf of Bell Atlantic and Pacific Telesis, to William Caton, CC Dkt. No. 95-185 (filed February 26, 1996) ("Kellogg Letter").

Commission's role in fashioning interconnection arrangements among telecommunications carriers"); Kellogg Letter at 1 (1996 Act "expressly strips the Commission of the authority to mandate" interconnection, including CMRS interconnection).

This argument is based on the faulty premise that, through its enactment of Sections 251 and 252, Congress implicitly repealed certain provisions of the Communications Act, especially Sections 332 and 2(b). However, these provisions of the Communications Act remain intact and cannot simply be ignored. Indeed, they form part of the comprehensive statutory framework for interconnection that can and should be interpreted harmoniously with Sections 251 and 252.¹⁴ For example, Section 332(c)(1)(B) of the Act requires that "[u]pon reasonable request of any person providing commercial mobile service, the Commission shall order a common carrier to establish physical connections with such service pursuant to the provisions of Section 201 of the Act." 47 U.S.C. § 332(c)(1)(B).¹⁵ This provision makes explicit the more general Section 201(a) obligation for "physical connection with other carriers" when it is in the public interest, by vesting with the Commission the powers to: (1) decide what is a "reasonable request for interconnection" by a CMRS operator and (2) issue an order directing another carrier, including an incumbent LEC, to interconnect with a CMRS operator. *See also CMRS Second R&O*, 9 FCC Rcd. at 1493 ("The Budget Act [of 1993] requires the Commission to respond to the request of any person providing commercial mobile radio service, and if the request is reasonable, the

¹⁴ Morton v. Mancari, 417 U.S. 535, 550 (1974) ("In the absence of some affirmative showing of an intention to repeal, the only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable."); United States v. Borden Co., 308 U.S. 188, 198 (1939) ("It is a cardinal principle of construction that repeals by implication are not favored. When there are two acts upon the same subject, the rule is to give effect to both if possible.").

¹⁵ 47 U.S.C. § 201(a) (Commission may order carrier "to establish physical connections with other carriers").

Commission shall order a common carrier to establish physical connections with such service . . .")

Notably, the language of Section 332(c)(1)(B) does not restrict the Commission's jurisdiction to interstate communications, and the 1993 amendment to Section 2(b) confirms that the Commission's authority, while ordinarily limited to interstate communications, extends to intrastate communications when Section 332 requirements, including interconnection, are in the balance. 47 U.S.C. § 2(b) ("Except as provided in . . . Section 332, . . .").¹⁶ Thus, the Commission's Section 332 authority extends to intrastate as well as interstate CMRS communications.¹⁷

The LECs fail to recognize that Section 332(c)(1)(B) establishes the Commission's authority over CMRS interconnection separate and apart from Section 251 and 252. Bell Atlantic and Pacific Telesis, for example, fail to reconcile the statutory command that "*the Commission shall order* a common carrier to establish physical connections with [CMRS] service" at 47 U.S.C. § 332(c)(1)(B), with their assertion that the Commission "is not permitted by the Act to interfere with the [interconnection] process." Kellogg Letter at 1.

Section 332(c) also provides for the Commission to be the arbiter of CMRS interconnection rates. States are expressly prohibited from regulating interconnection rates charged by CMRS operators, and state interconnection regulations that amount to barriers to CMRS market entry are also prohibited. 47 U.S.C. § 332(c)(3). While the LECs claim that the statutory prohibition against state regulation of "rates charged by any commercial mobile

¹⁶ See also, Comments of Comcast at 32.

¹⁷ In enacting Section 332, the 1993 Congress meant to vest control of interconnection with the Commission, not the states, in order to "foster the growth and development of mobile services that, by their nature, operate without regard to state lines as an integral part of the national telecommunications infrastructure." H. R. Rep. 111, 103d Cong., 1st Sess. at 260 (1993).

service" refers only to rates offered by CMRS operators to subscriber end-users,¹⁸ the statute on its face applies to *all rates*, including interconnection rates. CMRS Second R & O, 9 FCC Rcd. at 1500 (citing Section 332(c)(3) of the Communications Act, the Commission found "the statutory language is clear . . . the statute preempts state regulation of interconnection rates of CMRS providers.").¹⁹ Section 332(c)(3) confirms the Commission's authority under 47 U.S.C. § 201(a) to require reasonable and just rates and practices by CMRS operators, including interconnection rates. The LECs' arguments that only the states, and not the Commission, have the power to review interconnection rates, pursuant to Section 252, are flatly contradicted by Section 332(c)(3). *See also* H.R. Conf. Rep. No. 213, 103d at Cong., 1st Sess. at 490 (1993) (Congress enacted Section 332 "to establish a Federal regulatory framework to govern the offering of all commercial mobile services.").

Moreover, the LECs can cite no provision of either Section 251 or 252, or the legislative history, to support the proposition that, in 1996, Congress intended to take away the Commission's authority over CMRS interconnection established in the 1993 amendments. Instead, the newly-enacted Title II, Part II provisions work in tandem with the Title III provisions. The 1996 Act even explicitly affirms the Commission's authority to act in furtherance of Sections 201 and 332(c). 47 U.S.C. § 253(e) ("Nothing in this section shall affect the application of section 332(c)(3) to commercial mobile service providers."); 47 U.S.C. § 251(i) ("Nothing in this section shall be construed to limit or otherwise affect the Commission's

¹⁸ Kellogg Letter at 4.

¹⁹ Because CMRS interconnection rates cannot be regulated by the states Congress established the Commission's overarching authority over CMRS-LEC interconnection, Omnipoint urges the Commission to reconsider its position in *Petition on Behalf of the Louisiana Public Service Commission, Report and Order*, 10 FCC Rcd. 7898, 7908 (1995) (state regulation of LEC to CMRS interconnection rates is not proscribed by Section 332(c)(3)). NPRM at ¶ 112.

authority under Section 201"); H.R. Conf. Rep. No. 458, 104th Cong., 2d Sess. at 123 (1996) ("New subsection 251(i) makes clear the conferees' intent that *the provisions of new section 251 are in addition to, and in no way limit or affect, the Commission's existing authority* regarding interconnection under section 201 of the Communications Act.") (emphasis added).

Despite the LECs' contentions, CMRS operators are not obligated by Sections 251 and 252 to pursue only one course for interconnection with the incumbent LECs. By adopting (in 1993) and retaining (in 1996) the CMRS interconnection provisions of Section 332, and then adopting the more general interconnection scheme for all "telecommunications carriers" in 1996, Congress provided CMRS operators with the option²⁰ of pursuing interconnection either through Section 332 with the Commission, or through Sections 251 and 252 with private negotiation, arbitration, and state approval.²¹

Evidence of Congress' intent to preserve flexibility for new CMRS entrants is also found by the fact that, under the 1996 Act, CMRS operators are not wedded to the same interconnection obligations as LECs and incumbent LECs. Congress established this additional flexibility by excluding CMRS operators from the definition of "local exchange carrier." 47 U.S.C. § 153(44). A CMRS operator is only subject to the general obligation of all telecommunications carriers "to interconnect directly or indirectly with the facilities and equipment of other telecommunications

²⁰ Omnipoint recognizes that there are alternative interpretations of the relationship of Sections 251 and 252 with Section 332. For example, PCIA in its reply comments suggests that Section 252 negotiations can work with a federally mandated bill-and-keep arrangement. Others interpret Section 332 as "federalizing" CMRS interconnection so that it is exempted from treatment under Sections 251 and 252. Each of these interpretations, however, in contradiction to the LECs' position, recognize that Section 332 preserves the Commission's jurisdiction to regulate CMRS-LEC interconnection rates and to establish an interim bill-and-keep method.

²¹ Even under the state approval process established by Section 252(e) of the Act, the Section 332(c)(3) prohibition on state regulation of CMRS interconnection rates still applies, preventing the states from review of certain aspects of the interconnection agreement.

carriers." 47 U.S.C. § 251(a)(1).²² Significantly, this provision does not require the telecommunications carrier to avail itself only of the process set out in Sections 251(b) through 252. Taking the 1996 Act and the 1993 Budget Act provisions together, the CMRS operator is free to seek interconnection by Section 332 or, if it so chooses, by Sections 251 and 252.

Instead of placing the ongoing CMRS interconnection process on a completely different track, Sections 251(b) through 252 expand the available options for CMRS providers. These sections provide competing telecommunications carriers, including CMRS providers, with additional substantive rights for interconnection, and an additional process to obtain those rights, vis-à-vis the current local exchange monopoly. *See*, H.R. Conf. Rep. No. 458, 104th Cong., 2d Sess. at 123 (1996) ("New subsection 251(i) makes clear the conferees' intent that *the provisions of new section 251 are in addition to, and in no way limit or affect, the Commission's existing authority* regarding interconnection under section 201 of the Communications Act.") (emphasis added). The 1996 Act unequivocally places the obligations to abide by the many safeguards of Section 251(b) through 252 on the LECs, not the new entrant "telecommunications carriers." All LECs must comply with Section 251(b), including the duty to offer reciprocal compensation arrangements to requesting carriers. *Id.* at § 251(b)(4). Incumbent LECs have additional affirmative duties pursuant to Section 251(c), including the obligation to negotiate in good faith with requesting carriers, and to provide interconnection "on rates, terms, and conditions that are just, reasonable and nondiscriminatory." *Id.* at §§ 252(c)(1)&(2). Section 252 provides a further

²² SBC's assertion that CMRS providers seeking interconnection are under the same "legislative duty" as the incumbent LECs to negotiate only pursuant to Sections 251 and 252 is, therefore, mistaken in two ways. Comments of SBC Communications, Inc. at 3. First, it ignores the fact that CMRS providers have rights to interconnection pursuant to Section 332, which are separate from Section 251 rights. Second, the potential for bad faith negotiation as between the CMRS operator, which lacks market power and needs interconnection to commence service, and the incumbent LEC, which has maintained a monopoly for decades, makes the incumbent LECs' negotiation practices far more suspect.

safeguard from incumbent LEC monopoly abuse by affording telecommunications carriers a process of state intervention and review of arrangements arrived at through private negotiation or arbitration with incumbent LECs. *Id.* at § 252(a)(1) & (b).

These provisions are intended to give competing telecommunications carriers *additional* rights to overcome the historical interconnection problems created by the LECs' continuing monopoly control of the local loop. *See* H.R. Conf. Rep. No. 458, 104th Cong., 2d Sess. at 121 (1996) ("section 251(b) imposes several duties on all local exchange carriers" and "section 251(c) imposes several additional obligations on incumbent LEC[s]"); H.R. Rep. No. 204, 104th Cong., 1st Sess. at 50 (1995) (Committee seeks to change historical and current monopoly market for local telecommunications services through introduction of competition); S. Rep. No. 104-23, 104th Cong., 1st Sess. at 19 (1995) (intent of Senate interconnection provision was to impose obligations "on local exchange carriers possessing market power"). It would be entirely contrary to Congressional intent for the Commission to interpret these provisions as taking away from CMRS operators the rights to interconnection also established under Section 332.

Therefore, the Commission must continue to interpret Section 332 meaningfully, and interpret Sections 251 and 252 as an avenue that the CMRS operator may pursue in addition to its rights under Section 332.

B. The Commission Has Authority to Adopt An Interim Bill-And-Keep Scheme.

The Commission is well within its authority to adopt a bill-and-keep compensation method. As many commenters pointed out, several states have adopted similar bill-and-keep arrangements as a way of encouraging interconnection while long-term arrangements are worked out. That same principle applies here. Courts and the Commission have also recognized the need for the Commission to apply interim rules in order to change regulatory direction, preserve its authority, and implement federal policy objectives. United States v. Southwestern Cable Co., 392 U.S. 157 (1968). *See also* Order, MM Dkt. No. 92-266, 8 FCC Rcd. 2921 (1993) (Commission orders nationwide freeze of cable television rates to ensure successful

implementation of rate provisions of 1992 Cable Act), *motions for stay denied*, Order, 8 FCC Rcd. 2917 (1993).

Bill-and-keep does not constitute a taking in violation of the Fifth Amendment of the U.S. Constitution. *Cf.*, Comments of Bell Atlantic at 8-9. As common carriers, the LECs have no vested property interest in keeping other carriers from interconnecting and terminating their traffic on the LECs' network. LECs have a pre-existing common carrier duty, established by Section 201 of the Communications Act, to interconnect, and so there are no reasonable investment-backed expectations to be free from that obligation. Penn Cen. Transp. Co. v. New York, 438 U.S. 104, 135-38 (1978) (law does not constitute a taking where it is substantially related to governmental purpose and owner retains "reasonable beneficial use" of its property). Bill-and-keep does not operate as a confiscatory regulation depriving the LECs' of all useful value of their network. *Id.* at 130-31 ("takings jurisprudence" does not divide segments of property into discrete rights, rather the focus is "on the character of the action and on the nature and extent of the interference with rights" in the property). Moreover, the process of transferring electrical signals from one network to another does not physically intrude into the LEC's property. Interconnection, and bill-and-keep, is not the sort of physical intrusion found to be a taking under Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 438 (1982) ("direct physical attachment of plates, boxes, wires, bolts, and screws to the building, completely occupying space immediately above and upon the roof and along the building's exterior wall" constitutes a taking). Therefore, there is no constitutional taking for which reasonable compensation would be required.

Regardless, each carrier is compensated under bill-and-keep. Bill-and-keep is a continuation of the Commission's policy for mutual and reciprocal compensation. With bill-and-keep each carrier obtains interconnection with the others' network, with the added costs of termination offset by the benefits derived from termination on the other network.

Finally, we note that, in establishing an interim bill-and-keep scheme to encourage the entry of CLECs in the local exchange market, the California Public Utility Commission recently considered and rejected the same takings claim as made in this proceeding. *Re Competition for Local Exchange Services*, Decision 95-09-121, 165 P.U.R.4th 127 (September 27, 1995). The PUC found that an interim bill-and-keep scheme simply does not interfere with "investment backed expectations," and that the LECs receive some benefit under the plan while possible costs will be relatively low. Moreover, "it must be kept in mind that without some mechanism to deal with mutual call termination, local exchange competition cannot even begin." *Id.* The same constitutional principles and pro-competitive policies should guide the Commission's decision here.

CONCLUSION

For the foregoing reasons and as stated in its initial comments, Omnipoint urges the Commission to implement a bill-and-keep requirement to govern LEC-CMRS interconnection.

Respectfully submitted,

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